IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1347

THE MARTIN SWEETS COMPANY, INC. - Petitioner

versus

ROSE M. JACOBS - - - - - - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner The Martin Sweets Company, Inc. ("Sweets" or "Petitioner"), by counsel, respectfully submits this brief in reply to the brief in opposition filed by Respondent Rose M. Jacobs ("Jacobs" or "Respondent").

OPINION BELOW

Since the filing of the petition for writ of certiorari, the opinion of the Court of Appeals for the Sixth Circuit has been reported at 13 E.P.D. ¶11,537.

REASONS FOR GRANTING THE WRIT

The following is a reply to the two points raised by Respondent.

I.

The Question Presented Fairly Includes Important Questions Set in the Terms and Circumstances of the Case.

Whether or not this case is characterized as a "sexual practices" case is not critical. The critical question is whether or not the record facts, including those found by the District Court, show sex discrimination which is unlawful under Title VII of the Civil Rights Act of 1964.

Respondent's position is that the question presented by Petitioner on page 2 of the petition in this case is not presented by the record below. The question presented in the petition was framed in the terms and circumstances of the case in such a way as to avoid a series of unnecessarily repetitious and overlapping questions to this Court. Rule 23(1)(c) of the Rules of the Supreme Court makes it clear that the question presented will be read to include all questions fairly comprised therein. The question presented in the petition plainly asks the Court to establish in the context of a termination case, the burden and standards of proof required of an unwed pregnant plaintiff alleging a violation of the sex discrimination provisions of Title VII.

What the District Court and the Court of Appeals for the Sixth Circuit failed to comprehend throughout their consideration of this case is that termination of Respondent Jacobs because of unwed pregnancy did not violate the sex discrimination provisions of Title VII. The reason for the erroneous decisions and misleading characterization of this case as a sex discrimination matter is that the District Court and the Sixth Circuit failed to apply the burden of proof standards of *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 39 S. Ct. 1817, 36 L. Ed. 2d 668 (1972). The District Court found and the Sixth Circuit agreed that Jacobs was terminated and/or constructively terminated by Sweets because of unwed pregnancy, but neither Court analyzed or explained why that action constitutes prohibited gender-based discrimination.

The record shows that Jacobs was replaced by another woman (Transcript of the Proceedings, July 17, 1975, pp. 195, 227). This clearly negatives the essential element of Jacobs' prima facie case concerning which Jacobs introduced no evidence at all. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U. S. at 801-802. Further, the other pregnant employees of Sweets, all of whom were married, had never been subjected to any adverse employment action as a result of pregnancy (Petition, p. 3, n. 7, and cites to the record therein).

While reasonable persons might differ over attitudes regarding unwed pregnancy, the principle of *General Electric Co.* v. *Gilbert,* 429 U. S. ——, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), makes it abundantly clear

that employment actions taken with respect to pregnant employees do not *per se* amount to gender-based discrimination prohibited by Title VII. The Sixth Circuit and other Courts of Appeals have apparently been blinded by the single fact that only women can become pregnant. Those courts held, prior to *General Electric,* that any classification involving pregnancy was some sort of *per se* violation of the sex discrimination provisions of Title VII. Now, even after *General Electric,* and despite the compelling fact that Jacobs was replaced by another woman, the Sixth Circuit cannot see beyond the fact that she was pregnant.

An employment action taken because of unwed pregnancy does not amount to an employment action taken because of gender. Sweets has neither (1) taken any employment action with regard to Jacobs because of her gender nor (2) foreclosed even one position in the job market to women. Unless Sweets' action resulted in one of these two things, there has been no violation of the letter or the spirit of Title VII of the Civil Rights Act of 1964. *General Electric Co.* v. *Gilbert, supra.*

II.

The Sixth Circuit's Decision Is in Conflict With *General Electric Co.* v. *Gilbert* and This Case Presents Issues Not Raised in *Satty* and *Berg.*

The second point which Respondent raises in her brief is equally inappropriate and without merit. The decision of the Sixth Circuit is in conflict with the heart of this Court's holding in *General Electric Co.* v. *Gilbert, supra.* Equally serious, it is misleading and incorrect to state, as Respondent did on page 5 of her brief, that the case at bar can add nothing to the issues to be presented to the Court in *Nashville Gas Co.* v. *Satty,* No. 75-536, cert. granted, January 25, 1975; and *Richmond Unified School District* v. *Berg,* No. 75-1069, cert. granted January 25, 1977. First, counsel for Respondent presumes to tell the Court what issues it will decide in those two cases. Secondly, it must be noted that *Satty* and *Berg* deal with a pregnancy issue in the context of benefits or employment conditions, as did the *General Electric* case.

In contrast, the case at bar presents pregnancy issues in the context of a termination case and, in that sense, gives the Court the opportunity, not present in any of the benefits or conditions cases because of the factual context, to define, for the first time, sex discrimination in a termination case. The Court could also draw as sharp a distinction as possible between *sex discrimination* cases and *sexual practice* cases which are outside Title VII. These questions certainly were not raised or considered in *General Electric,* nor are

they presented for consideration in *Satty* or *Berg* or in other benefits and conditions of employment cases. This final point again illustrates the great need on the part of the courts and the bar for guidance as to the parameters of unlawful sex discrimination.

CONCLUSION

For the reasons stated above and in the petition, Petitioner requests that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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